Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-210

In the Matter of the Application of County of Nassau Acquiring Property for the Mill Neck Conservation of the Area of Open Space and Excess Lands, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York

---

THE COUNTY OF NASSAU,

Appellee,

-against-

EVEANDRA ENTERPRISES, INC.,

Appellant.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO.

In the Matter of the Application of County of Nassau Acquiring Property for the Mill Neck Conservation of the Area of Open Space and Excess Lands, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York

---

THE COUNTY OF NASSAU,

Appellee,

-against-

EVEANDRA ENTERPRISES, INC.,

Appellant.

JURISDICTIONAL STATEMENT

(a) OPINIONS OF COURTS BELOW

The opinions of Special Term, Nassau County, and that of the Appellate Division, Second Department of the Supreme

Court of the State of New York have not been reported. The opinion of the New York State Court of Appeals has not yet been reported. Copies of the foregoing opinions are appended hereto as appendices A, B and C respectively, at pages 1a, 5a and 8a respectively.

(b) STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) NATURE OF PROCEEDING AND STATUTE PURSUANT TO WHICH BROUGHT. This is a condemnation proceeding instituted by the County of Nassau, State of New York, pursuant to Title B, Article 1 of the Nassau County Administrative Code (Laws of 1939 Ch. 272, as amended). Appellant by undisputed evidence, established at the trial that the prevailing and proper rate of interest to be added to the condemnation award for the 5-1/2 year delay in payment of the award was 9.75% per annum. This proof established the just compensation that appellant was entitled to by the Fifth Amendment made applicable by the Fourteenth Amendment to the Constitution. That the determination of the rate of interest was a judicial function in accordance with the due process provision of the Fourteenth Amendment. This is an appeal from the order of the New York State Court of Appeals affirming the order of the Appellate Division. The Appellate Division held that the appellant's evidence did not overcome the presumptive validity of the statutory rate (§ 3-a(2) General Municipal Law). The Court of Appeals held that the appropriate rate of interest is not measured by fluctuation

in categories of interest rates for public or private securities or lending; that so long as the statutory rate constitutes a judicially acceptable fair return for the deprivation of the use of that property, the statutory rate should be considered proper.

Appellant contends that §3-a(2) of the General Municipal Law, a state statute, as applied by the New York Court of Appeals to the undisputed facts in this case, is repugnant to the guarantees and rights of the Fifth and Fourteenth Amendments to the Constitution; is in violation of the constitutional doctrine of the separation of powers of the Legislature and the Judiciary, and is in conflict with the decisions of this Court, the United States Court of Appeals and the highest Court of the State of New York.

(ii) DATES OF JUDGMENT OR DECREE SOUGHT TO BE REVIEWED. The order of the New York State Court of Appeals was dated June 7, 1977, and filed in the Office of the County Clerk of Nassau County on June 15, 1977, a copy of which is appended hereto as Appendix D at page 10a. The Notice of Appeal to the Court of Appeals dated May 7, 1976 was filed on May 10, 1976 in the Office of the Clerk of the County of Nassau, a copy of which is appended hereto as Appendix E at page 11a.

(iii) STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION. The statutory provision believed to confer on this Court jurisdiction is 28 U.S.C. 1257(2).

(iv) CASES BELIEVED TO SUSTAIN THE JURISDICTION. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Cohen v. California*, 403 U.S. 15 (1971).

(v) STATE STATUTE WHOSE VALIDITY IS INVOLVED. §3-a(2) of the General Municipal Law, as amended by L1939 C 1102 (23 McKinney's Consolidated Laws of New York) whose validity as applied to the undisputed facts in this case, is drawn into question by the decision of the New York State Court of Appeals, reads in part as follows:

> "§3-a. Rate of interest on judgments and accrued claims against municipal corporations.
>
> "2. The rate of interest to be paid upon any judgment or accrued claim against the municipal corporation arising out of condemnation proceedings or action to recover damages for wrongful death shall not exceed six per centum per annum.
>
> "3. The term 'municipal corporation' as used in this section shall mean and include a ... county ...."

(c) QUESTION PRESENTED

Whether, where appellant in a condemnation proceeding had established by undisputed evidence that the prevailing and fair rate of interest was 9.75 per cent per annum to be added to the award for the 5-1/2 years delay in payment of the award, is the

application by the New York State Court of Appeals of §3-a(2) of the General Municipal Law to the facts in this case, holding that the statutory interest rate of 6 per cent per annum is judicially acceptable as a fair return for the use by the county of appellant's property after the taking, a deprivation of just compensation guaranteed by the Fifth Amendment made applicable by the Fourteenth Amendment, the due process clause of the Fourteenth Amendment to the Constitution, and in conflict with this Court's decisions.

(d) STATEMENT OF CASE

The County of Nassau, State of New York, acquired appellant's property consisting of 33 acres of vacant land, in eminent domain proceedings. Partial advance payments were made to appellant in the aggregate sum of $107,725.75 with interest thereon at 6 per cent per annum from the date of title vesting. Special Term of the Supreme Court entered its partial tentative decree on January 30, 1975 making an award of $261,300.00 and which provided that "Awards carry interest at the rate of six per cent (6%) per annum from the date of vesting title, namely; October 7, 1969," a copy of the partial tentative decree is appended hereto as Appendix F at page 14a. Pursuant to §11.38.0 of the Nassau County Administrative Code, appellant, on March 3, 1975, filed verified objections to the partial tentative decree alleging: "That the said award made for the taking of your objector's property herein, constitutes the taking thereof without just compensation ... and to taking of private

property without due process of law, contrary to XIV Amendment of the Constitution of the United States of America," a copy of the objections is appended hereto as Appendix G at page 18a.

On the hearing of objections appellant's witnesses testified to and produced supporting data of the prevailing rate of interest during the 66 month period from title vesting date to the date of the trial.

James Hume, executive vice-president of the Manufacturers Trust Co. testified as to the prevailing prime rates of interest and to the practices of banks in the metropolitan area of New York City with respect to interest charges on loans during this period (A-56-107).[1] Professor Roger F. Murray, a Sloan Colt professor of banking and finance in the Graduate School of Business, Columbia University, submitted a report with exhibits and testified as to prevailing rates of interest during the period on borrowing and rates of return on investments (A-108-148). He testified that the applicable rate is midpoint between average borrowing cost during this period of 12 per cent per annum, and the county's return on short term investments of 7.5 per cent per annum, which midpoint was 9.75 per cent per annum.

At the conclusion of Professor Murray's testimony, the trial attorney for the county stated to the court that if after reviewing Professor Murray's

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[1] Numerals preceded by "A" refer to pages in Appellant's Appendix filed in the New York State Court of Appeals, which was transmitted to this Court along with a part of the original record, by the Nassau County Clerk.

testimony with his expert, he found it to be " fair statement and opinion," that there would be no need for cross-examination or proof on his part (A-129, 130). The county attorney neither cross-examined Professor Murray or offered any proof as to the prevailing rate of interest.

Special Term of the State Supreme Court held (Appendix A), that in the judicial process of determining just compensation "the court is to be guided by the applicable statute (General Municipal Law, §3-a(2) and surrounding circumstances" that the statute is "presumptively valid" and that "A review of the applicable authorities has shown" that, "the rate of interest as set by the Legislature as being fair and just compensation," the Court concluded "that the 6 per cent interest paid on the condemnation award herein is fair and within the judicial ascertainment of just compensation."

On appeal to the Appellate Division of the Supreme Court, Second Department, appellant argued in its briefs that the Special Term's application of §3-a(2) of the General Municipal Law to the undisputed facts in this case, was repugnant to the Constitution. The Appellate Division affirmed Special Term and held (Appendix B), that "In our opinion, claimant's evidence did not overcome the presumptive validity of the statutory rate."

Appellant appealed to the Court of Appeals pursuant to §5601(b)(1) of the CPLR solely on the question of the constitutionality of §3-a(2) of the General Municipal Law as applied by the Appellate

Division to the undisputed facts in this case, and stated in its notice of appeal, argued orally and in its briefs that the decision of the Appellate Division was repugnant to the Fifth and Fourteenth Amendments to the Federal Constitution and was violative of the constitutional doctrine of the separation of powers (Appendix E).

The Court of Appeals affirmed the Appellate Division and held (Appendix C), that "compensation accruing at the time of vesting and for the period prior to an award in a condemnation proceeding 'is payable as a substitute for the beneficial use of the real property' (*Matter of Rochester Carting Co. v. Levitt*, 36 N.Y.2d 264, 268)," that the appropriate interest rate is not measured by fluctuations of interest rates for public or private securities or lending, and that "so long as the statutory rate constitutes a judicially acceptable, fair return for the deprivation of the use of that property or the money equivalent of that use ... the statutory rate should be considered proper."

(e) SUBSTANTIALITY OF FEDERAL QUESTION

The questions raised in this case are substantial and reach beyond the particular condemnee here. They involve vital just compensation and due process questions affecting rights of owners of property acquired in condemnation proceedings and apply generally to all affected by statutes fixing the maximum amount of compensation. As a result of the decision of the New York

State Court of Appeals, if the constitutional question here involved is not resolved, the courts of New York will have the right to find that, despite evidence to the contrary (unchallenged as in this case), that the statutory rate of interest on condemnation awards, is "judicially acceptable." The decisions of this Court holding that the quantum of interest as part of just compensation is a judicial question, will be subverted, in that a factual determination will be permitted to be made on other than that based upon evidence. Further, the constitutionality of the decision of the Court of Appeals should be resolved with respect to its holding that the statutory rate of interest as applied to a condemnation award, represents the beneficial use (net rental value) of the property then in the ownership of the condemnor, after the taking, as distinguished from the loss of the use of the money awarded for the property. By this holding a new doctrine was established as a measure for New York State, and will be a landmark for other jurisdictions. It is at variance with the decisions of this Court, for as stated in *Seaboard Air Lines Ry. Co. v. U.S.*, 261 U.S. 299, 306, "Interest at a proper rate is a good measure by which to ascertain the amount to be so added."

The statute as applied by the Court of Appeals to the undisputed facts in this case is in direct conflict with the decisions of this Court which hold that interest on a condemnation award is part of just compensation whose determination is solely a judicial function and that the Legislature cannot say what compensation shall

be paid or what shall be the rule of compensation. *Seaboard Air Lines Ry. v. U.S.*, 261 U.S. 299 (1923); *Jacobs v. U.S.*, 290 U.S. 13 (1933); *Phelps v. U.S.*, 274 U.S. 341 (1927); *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893); *U.S. v. Commodities Corp.*, 339 U.S. 124 (1950), and to the same effect the decisions of the United States Court of Appeals, *U.S. v. Blankinship*, (9th Cir.) 543 F.2d 1272 (1976); *U.S. v. 100 Acres of Land*, (9th Cir.) 468 F.2d 1261 (1972); and as well as the decisions of the New York State Court of Appeals *Re Manhattan Civic Center Area*, 57 Misc. 2d 156 (1968), aff'd. 32 A.D.2d 530 (1969), aff'd. 27 N.Y.2d 518 (1970); *Matter of City of New York (E. 178th St.)*, 107 A.D.2d 22, 25 (1905), aff'd. 183 N.Y. 571, 576 (1906); *Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 79 (1966); *Matter of City of New York (In re Water Front in the City of New York*, 190 N.Y. 350, 353 (1907).

The Court of Appeals, holding that the statutory rate of interest at 6 per cent is "judicially acceptable" as a fair return for the use of the property acquired is in direct conflict with *Phelps v. U.S.*, 274 U.S. 341, 343, 344 (1927).[2] It is the loss of the use

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[2] In *Phelps v. U.S.*, supra, the plaintiffs owned a lease on a pier which the Secretary of War requisitioned for use in carrying on the war. This Court held that the plaintiffs were "entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made," plaintiffs were entitled to "that interest at a reasonable rate from the date of the use to the time of payment (which) is a good measure of the amount to be added in order to make just compensation."

of the money awarded, by reason of the delay in payment and not compensation for the use and occupation of the property by the condemnor after the taking. As is stated in *Lincoln Square Slum Clearance Project*, 15 A.D.2d 153, 179, aff'd. 16 N.Y.2d 497:

> "The condemnee's sole damage is delay in the payment of his award. His sole claim is to an additional element of compensation for delay, which in all logic should stem from the withholding of the money he is entitled to receive on the date of the taking, and not from the rental value of property in which he no longer held any interest. 'This additional element of compensation has been measured in terms of reasonable interest' (*Allrecht v. United States*, 329 U.S. 599, 602, 67 S. Ct. 606, 608), or interest 'at a proper rate' (*Jacobs v. United States*, 290 U.S. 13, 17 ...)."

In support of its holding, the Court of Appeals cites *Matter of Rochester Carting Co. v. Levitt*, 36 N.Y.2d 264, 268 for the proposition that interest "is payable as a substitute for the beneficial use of the real property." The *Rochester* case ennunciated no such doctrine. The sole issue in that case was the constitutionality of a State statute providing for the cessation of post-judgment interest against the State of New York in condemnation proceedings. The Court in *Rochester*, in pointing out the distinction between

prejudgment and postjudgment interest in condemnation proceedings cites in dicta, *LaPorte v. State of New York*, 6 N.Y. 1, 6-7 for the proposition that "Interest accruing prior to the award is payable as a substitute for the beneficial use of real property." That no such doctrine existed was clearly pointed out in the decision by the Appellate Division in *Lincoln Square Slum Clearance Project*, 15 A.D.2d 153, 178-180 (1961) which was affirmed by the Court of Appeals in 16 N.Y.2d 497 (1965). The Appellate Division held that LaPorte ennunciated "no new doctrine," that it involved a claimant who had remained in possession after title vesting, and in such circumstance the beneficial use during that period was properly used as a set-off adjustment against interest.

No constitutional mandate is violated by a denial of interest during the period while the owner enjoyed the full beneficial use of the premises. *Shoemaker v. U.S.*, 147 U.S. 282, 302 (1893); *Hemersley v. Mayor, City of New York*, 56 N.Y. 533. There can be no set off of the value of the use in this case where the property acquired was vacant land and not occupied by appellant after title vesting.

The doctrine is well settled that value is determined as of the date of the taking and that an owner is entitled to interest at an appropriate rate on the amount of such valuation from the date of the taking for delay in payment, as part of just compensation. *U.S. v. Rogers*, 255 U.S. 163 (1921); *Seaboard Air Lines Ry. Co. v. U.S.*, 261 U.S. 299, 306 (1923); *Jacobs v. U.S.*, 290 U.S. 13, 17 (1933);

Phelps v. U.S., 274 U.S. 341, 344 (1927); *Brooks-Scanlon Corp. v. U.S*, 265 U.S. 106 (1924); *U.S. v. Creek Nation*, 295 U.S. 103 (1935); *U.S. v. Klamath etc. Tribes of Indians*, 304 U.S. 119 (1938); *Liggett & Myers Tobacco Co. v. U.S.*, 274 U.S. 215 (1927); *Shoshone Tribe of Indians v. U.S.*, 299 U.S. 476 (1937); *U.S. v. North American Transp. Co.*, 253 U.S. 330 (1920); *Olson v. U.S.*, 67 F.2d 24 (1933), affd. 292 U.S. 246 (1934). It is the amount of interest available to an owner on the amount of the award, if invested on the date of the taking. *U.S. v. Blankinship*, (9th Cir.) 543 F.2d 1272, 1274 (1976). It is only where there is an absence of proof of a proper rate of interest to afford just compensation, that the statutory rate is accepted as presumptively fair during the elapsed period, which would satisfy the constitutional requirement. *Bronx River Parkway*, 259 A.D. 552 (1940), affd. 284 N.Y. 48 (1940), affd. *A.F. & G Realty Corp. v. City of New York*, 313 U.S. 540.

The holding by the Court of Appeals that the statutory rate of interest is "judicially acceptable" as fair return for the deprivation of the use of the property, violates the due process provision of the Fourteenth Amendment. The proper rate of interest is a factual question and should be determined by the trier of fact. *U.S. v. Blankinship*, (9th Cir.) 543 F.2d 1272, 1274 (1976). There is no record evidence upon which such a finding of judicial acceptability could be predicated. There was no evidence from which it could be found that the statutory rate of six per cent per annum was a fair return for the use of appellant'a property.

The Court of Appeals cites §16 of the State Finance Law (55 McKinney's Consolidated Laws of New York). This statute has no application to the question involved in this case. It was not cited or urged by appellant in any stage of the proveeding as bearing on any issue in this case. This statute reads:

> "§16. Rate of interest on judgments and accrued claims against the State.
>
> "The rate of interest to be paid by the State upon any judgment or accrued claim against the state shall not exceed six per centum per annum."

This statute has no application to interest on a condemnation award to be paid by the County of Nassau.

(j) NOTICE OF APPEAL TO THIS COURT

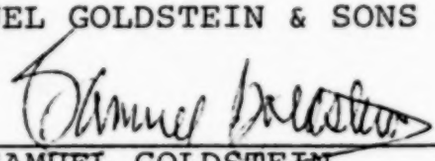
There is appended hereto as Appendix H at page 20a, the notice of appeal to this Court dated July 11, 1977 and entered in the Office of the Clerk of the County of Nassau, State of New York, on July 19, 1977.

We believe that the discussion above demonstrates that the question presented is so substantial as to require plenary consideration, with briefs on the

merits and oral argument for its resolution.

Respectfully submitted,

SAMUEL GOLDSTEIN & SONS

By: 

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APPENDIX A

OPINION OF SPECIAL TERM,
SUPREME COURT, NASSAU COUNTY

SUPREME COURT: NASSAU COUNTY, SPECIAL TERM, PART IV-A

In the Matter of the Application of the County of Nassau acquiring Real Property for the Mill Neck Conservation of the Area of Open Space and Excess Land, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York.

By ALBERT, J.

DATED June 13, 1975

Index No. 8960/69

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In the instant proceeding, the claimant, Eveandra Enterprises, Inc., seeks to increase the prevailing rate of 6 per cent interest paid on condemnation awards (General Municipal Law, § 3-a (2)) to 9.75 per cent on the theory that since the date of vesting, October 7, 1969, conditions in

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OPINION OF SPECIAL TERM,
SUPREME COURT, NASSAU COUNTY

the money market were such that the aforesaid 6 per cent interest is unreasonably low and deprives claimant of its constitutional right of just compensation.

The issue presented in this proceeding, to wit, the appropriate interest rate in condemnation proceedings, is by no means a new question (see, e.g., *Matter of City of New York* [*Municipal Building*], 57 Misc. 2d 156, affd. 32 A.D.2d 530, affd. 27 N.Y.2d 518; *Matter of City of New York*, [*Bronx River Parkway*], 284 N.Y. 48, 54, affd. 313 U.S. 540; *Matter of Incorporated Village of Hempstead*, 33 A.D.2d 1036; *Matter of Averne II, Queens Co. Sup. Ct.* (Castaldi, J.), N.Y.L.J., June 3, 1975, p. 19, col. 8; *Matter of City of New York* [*Washington Heights-Highbridge Park Development Area*], New York Co. Sup. Ct. (Cotton, J.), N.Y.L.J., April 10, 1975, p. 14, col. 3; *Matter of Hillside Ave. & Park Ave.*, Nassau Co. Sup. Ct., Index No. 7638-70, (Meade, J.)).

Culling from the above cited cases, the principle emerges that the fixing of an appropriate rate of interest is part of the judicial process of determining "just compensation" and that the court is to be guided by the applicable statute and surrounding circumstances. While the statutory rate of interest is no doubt an important consideration, it is not conclusive upon the Court. However,

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OPINION OF SPECIAL TERM,
SUPREME COURT, NASSAU COUNTY

it is presumptively valid. A review of the applicable authorities has shown that the general policy of the courts has been to follow the rate of interest as set by the Legislature as being fair and just compensation. (Cf. *Matter of Averne II, supra*; *Matter of City of New York* [*Washington-Heights-Highbridge Park Development Area*], *supra, Matter of Hillside Ave. & Park Ave., supra.*) Indeed, in the Court's view, "just" compensation essentially means "fair" compensation and does not necessarily mean the maximum possible return if invested otherwise (see also *Matter of City of New York*, [*Washington Heights-Highbridge Park Development Area*], *supra*). Though the claimant introduced economic proof in the nature of expert financial witnesses to the effect that the 6 per cent interest rate would not adequately reimburse claimant due to the economic conditions during the period in question, the Court concludes after reviewing all of the evidence adduced herein that the 6 per cent interest paid on the condemnation award herein is fair and within the judicial ascertainment of just compensation.

The case upon which claimant places principal reliance, *Matter of City of New York* [*Municipal Building*], *supra*, can be distinquished. There the court was faced with the constitutional question of whether the statutory awards

APPENDIX A

OPINION OF SPECIAL TERM, SUPREME COURT, NASSAU COUNTY

of 4 per cent by the City of New York in condemnation awards was arbitrary and unconstitutional in view of the fact that the United States Government and New York State Government were paying 6 per cent interest on similar awards. The courts decided that question in the affirmative. However, no such question is presented in the instant proceeding.

The Court has considered the other objections raised by the parties herein and the Court adheres to its original award in all respects.

Submit partial final decree on notice in accordance herewith.

s/
J. S. C.

APPENDIX B

OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT, AND ORDER OF THE APPELLATE DIVISION

A - January 9, 1976

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of the Application of the County of Nassau Acquiring Real Property for Mill Neck Conservation of the Area of Open Space and Excess Land, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York.

COUNTY OF NASSAU,

Petitioner-Respondent,

EVEANDRA ENTERPRISES, INC.,

Claimant Appellant.

Samuel Goldstein & Sons, New York, N.Y. (Samuel Goldstein of counsel), for appellant.

John F. O'Shaughnessy, County Attorney, Mineola, N.Y. (Natale C. Tedone of counsel), for respondent.

In a condemnation proceeding, claimant appeals from so much of a partial final decree of the Supreme Court, Nassau County,

APPENDIX B

OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT, AND ORDER OF THE APPELLATE DIVISION

entered June 26, 1975, after a hearing, as provides that the award shall carry interest at the rate of 6% per annum.

Partial final decree affirmed insofar as appealed from, with costs.

In our opinion, claimant's evidence did not overcome the presumptive validity of the statutory rate (see *Matter of City of New York* [*Bronx River Parkway*], 259 App. Div. 552, affd. 284 N.Y. 48, affd. 313 U.S. 540; *Matter of Inc. Vil. of Hempstead* [*Y.M.C.A. of Nassau & Suffolk Counties*], 33 A.D.2d 1036).

MARTUSCELLO, Acting P.J., COHALAN, MARGETT, DAMIANI and RABIN, JJ., concur.

February 2, 1976.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 2, 1976.

HON. M. HENRY MARTUSCELLO, Acting Presiding Justice,
HON. JOHN P. COHALAN, JR.)
HON. CHARLES MARGETT)
HON. VINCENT D. DAMIANI)
HON. SAMUEL RABIN) Associate Justices.

APPENDIX B

OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT, AND ORDER OF THE APPELLATE DIVISION

[SAME TITLE]

In the above entitled cause, the above named Eveandra Enterprises, Inc., claimant, having appealed to this court from so much of a partial final decree of the Supreme Court, Nassau County, entered June 26, 1975, after a hearing, as provides that the award shall carry interest at the rate of 6% per annum; and the said appeal having been argued by Samuel Goldstein, Esq., of counsel for the appellant, and argued by Natale C. Tedone, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the partial final decree insofar as appealed from is hereby unanimously affirmed, with costs.

Enter:

s/ Irving N. Selkin

Clerk of the Appellate Division

APPENDIX C

MEMORANDUM DECISION OF THE COURT OF APPEALS APPEALED FROM

STATE OF NEW YORK

COURT OF APPEALS

No. 297
In the Matter of
The County of Nassau,
Respondent,
vs.
Eveandra Enterprises, Inc.,
Appellant.

(297) Samuel Goldstein, NY City, for appellant.
William Gitelman, Nassau Cty Attorney
(Matthew C. Tedone of counsel) for respondent.

MEMORANDUM:

We agree with the Appellate Division that claimant has not demonstrated that the validity of the statutory prejudgment interest rate of 6% is constitutionally infirm. Compensation accruing at the time of vesting and for the period prior to an award in a condemnation proceeding "is payable as a substitute for the beneficial use of the real property" (*Matter of Rochester Carting Co. v. Levitt*, 36 N.Y.2d 264, 268). Such compensation is awarded in these cases upon the theory that it is necessary to make it full compensation for the loss sustained by the landowner, and we are unable to agree with the claimant that the statutory rate of interest as provided in Gen. Mun. Law

APPENDIX C

MEMORANDUM DECISION OF THE COURT OF APPEALS APPEALED FROM

§3-a(2) and State Finance Law, §16 is in conflict with the constitutional right of just compensation. The result we here reach is not unreasonable and lends stability to the mandate for the payment of full and equitable compensation as fixed by the Legislature. The appropriate interest rate is not measured by particular fluctuations in categories of interest rates for public or private securities or lending. So long as the statutory rate constitutes a judicially acceptable, fair return for the deprivation of the use of that property or the money equivalent of that use, either or in combination, the statutory rate should be considered proper.

The order of the Appellate Division should be affirmed with costs.

* * * * * * * * * * * * * * * *

Order affirmed, with costs, in a memorandum. All concur.

Decided June 7, 1977

APPENDIX D

ORDER OF COURT OF APPEALS, APPEALED FROM, DATED JUNE 7, 1977

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

[SAME TITLE]

The appellant in the above entitled appeal appeared by Samuel Goldstein & Sons; the respondent appeared by James M. Catterson, Jr., Nassau County Attorney.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, in a memorandum. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, County of Nassau there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ Joseph W. Bellacosa
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office,
Albany, June 7, 1977.

APPENDIX E

NOTICE OF APPEAL TO THE COURT OF APPEALS

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Application of the County of Nassau Acquiring Real Property for Mill Neck Conservation of the Area of Open Space and Excess Land, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York.

COUNTY OF NASSAU,

Petitioner-Respondent,

EVEANDRA ENTERPRISES, INC.,

Claimant-Appellant.

S I R S :

PLEASE TAKE NOTICE that the claimant, Eveandra Enterprises, Inc. in the above entitled condemnation proceeding hereby appeals to the Court of Appeals as of right, pursuant to CPLR 5601(b)(1), on the ground that substantial constitutional questions are herein directly involved, from the order of the Appellate Division of the Supreme Court, Second Department, made and entered on February 2, 1976, which unanimously affirmed, insofar as appealed from to that Court, the partial final decree of the Supreme Court, Nassau

APPENDIX E

NOTICE OF APPEAL TO
THE COURT OF APPEALS

County, entered on June 26, 1976, which limited the rate of interest to be paid on the award made to the said claimant herein from the date of title vesting to 6% per annum, the rate provided by Section 3-a(2) of the General Municipal Law, contrary to said claimant's contention that the said statutory rate of interest of 6% per annum was so unreasonably low, in comparison with the prevailing rates of interest, that the effect of limiting said claimant to that rate was to deprive it of its constitutional right to receive just compensation for the taking of its property, as guaranteed by Article 1, Section 7 of the Constitution of the State of New York and the Fifth and Fourteenth Amendments of the United States Constitution; that the Court below by giving the aforesaid statute substantial evidentiary value as a matter of law, by treating it as presumptively correct in face of substantial evidence to the contrary has accorded the statute an unconstitutional construction by permitting the Legislature to exercise the judicial function of determining just compensation in violation of the constitutional doctrine of the separation of powers between the legislative and judicial branches of government; and that claimant appeals from each and every part of said order, as well as

APPENDIX E

NOTICE OF APPEAL TO
THE COURT OF APPEALS

from the whole thereof.

Dated: May 7, 1976

Yours, etc.

SAMUEL GOLDSTEIN & SONS
Attorneys for Claimant-
Appellant Eveandra
Enterprises, Inc.
Address & Post Office Address
217 Broadway
New York, N. Y. 10007
Telephone: (212) RE 2-5433

TO: Clerk, Appellate Division
Second Judicial Department
45 Monroe Place
Brooklyn, N.Y. 11201

Clerk, County of Nassau
240 Old Country Road
Mineola, New York 11501

James M. Catterson, J., Esq.
Nassau County Attorney
County Executive Building
Mineola, New York 11501

APPENDIX F

PARTIAL TENTATIVE DECREE,
SPECIAL TERM OF THE SUPREME COURT

At a Special Term of the Supreme Court for condemnation proceedings held in and for the County of Nassau at the Nassau County Supreme Court Building, Mineola, N.Y. on the 29th day of January, 1975.

PRESENT:

HON. DANIEL C. ALBERT,

JUSTICE OF SUPREME COURT.

In the Matter of the Application of the County of Nassau Acquiring Real Property for the Mill Neck Conservation of the Area of Open Space and Excess Land, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York.

The above entitled proceeding having been duly noticed for trial and having been placed on the Special Term Calendar of this Court for condemnation, and this proceeding having been called in its regular order on said calendar, and on due notice to all parties who have appeared herein, and the Hon. Daniel G. Albert, Justice of the Supreme Court

APPENDIX F

PARTIAL TENTATIVE DECREE,
SPECIAL TERM OF THE SUPREME COURT

having taken testimony concerning the damage awards on March 11, 12, 15, 18 and 19, 1974 and having viewed the property to be taken in this proceeding, and having duly made and filed his written decision as to the awards on December 19, 1974,

NOW, upon the said decision of Hon. Daniel G. Albert Justice of the Supreme Court, and all the proceedings heretofore had herein, it is

ORDERED, that the Hon. Daniel G. Albert, Justice of the Supreme Court in his decision dated December 19, 1974 having ascertained and estimated the compensation which ought justly to be made by the County of Nassau to the owners of the real property to be acquired, and the County Attorney of the County of Nassau having prepared by instruction of the Court the annexed tabular abstract of the estimate of damage as decided by the Court setting forth the amount of loss or damage to the parcels of real property affected by the proceeding, and said abstract also containing the names of the respective owners of such property, as far as the same may be ascertained, and a sufficient designation or description of such lots or parcels by reference to the number thereof indicated upon the damage map; such abstract when signed by the Hon. Daniel G. Albert, Justice of the Supreme Court, shall be filed with the Clerk of

APPENDIX F

PARTIAL TENTATIVE DECREE,
SPECIAL TERM OF THE SUPREME COURT

the County of Nassau and thereupon shall constitute the partial tentative decree of the Court as to the awards for damages, and be it further

ORDERED, that upon the filing of said partial tentative decree, the County Attorney of Nassau County shall give notice to all persons who have appeared in this proceeding by advertisement in the official newspapers in accordance with the provisions of Section 11-38.0 of the Nassau County Administrative Code that such partial tentative decree has been filed; that the County and all of the parties interested in the proceeding or in any of the real property affected thereby, having objections thereto, must file and serve such objections in writing, duly verified in accordance with the provisions of Section 11-38.0 of the Nassau County Administrative Code, and that the County Attorney of the County of Nassau, on a date specified in such notice, will apply to the Hon. Daniel G. Albert, Justice of the Supreme Court, who made the partial tentative decree, to fix a time when the said Hon. Daniel G. Albert, Justice of the Supreme Court, will hear the parties so objecting.

Entered
Jan. 30 1975
HAROLD W. McCONNELL
County Clerk of Nassau County

ENTER
DANIEL G. ALBERT
J.S.C.

Granted
Jan. 29 1975
HAROLD W. McCONNELL, Clerk

APPENDIX F

PARTIAL TENTATIVE DECREE,
SPECIAL TERM OF THE SUPREME COURT

TABULAR ABSTRACT

PRO. #887

REPUTED OWNER	TENTATIVE AWARD
EVEANDRA ENTERPRISES, INC.	$261,300.00 AA

Awards carry interest at the rate of six per cent (6%) per annum from the date of vesting title, namely: October 7, 1969. Awards are granted to designated parties upon their compliance with the requirements of the County Attorney as to proof of title, and are subject to the deduction of all liens, mortgages charges for use and occupancy of County property, if any, unpaid taxes, assessments and assignments of record.

Dated, Mineola, N.Y.
Jan. 29, 1975.

J.S.C.

APPENDIX G

NOTICE OF OBJECTIONS
TO THE PARTIAL TENTATIVE
DECREE OF SPECIAL TERM
OF THE SUPREME COURT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

[SAME TITLE]

Eveandra Enterprises, Inc., owner of premises described as follows:

Damage Parcel No. 15 Amount $261,300.00 without waiving any of its rights herein, do hereby object to the award made in the tentative decree of this Court herein, on the ground that the same is insufficient and inadequate and disproportionate and less than the damage sustained by reason of this proceeding.

That said award is contrary to law, contrary to the evidence and is based upon an erroneous method of awarding damages.

That the said award made for the taking of your objector property herein, constitutes the taking thereof without just compensation, contrary to Article 1, Section 7 of the Constitution of the State of New York, and to taking of private property without due process of law, contrary to the XIV Amendment of the Constitution of the United States of America.

APPENDIX G

NOTICE OF OBJECTIONS
TO THE PARTIAL TENTATIVE
DECREE OF SPECIAL TERM
OF THE SUPREME COURT

That the awarding of interest at the statutory rate of six (6%) percent per annum is unconstitutional as a denial of just compensation and an award of interest in excess thereof, as objectant is prepared to prove, should be made.

Your objector asks for an opportunity to be heard in support of these objections.

Dated, New York, New York
February 27, 1975

SAMUEL GOLDSTEIN & SONS
Attorneys for Objector
217 Broadway,
New York, N.Y. 10007

[Duly verified by
M. Robert Goldstein, Esq.
on February 27, 1975]

APPENDIX H

NOTICE OF APPEAL TO
THE SUPREME COURT OF
THE UNITED STATES,
FILED AND ENTERED IN
THE COUNTY CLERK'S
OFFICE OF NASSAU COUNTY,
NEW YORK, ON JULY 19, 1977.

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application of the County of Nassau Acquiring Real Property for the Mill Neck Conservation of the Area of Open Space and Excess Lands, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York

---

THE COUNTY OF NASSAU

Appellee

-against-

EVEANDRA ENTERPRISES, INC.

Appellant

S I R S:

PLEASE TAKE NOTICE that the above named appellant herein, EVEANDRA ENTERPRISES, INC., does hereby appeal to the Supreme Court of the United States from

APPENDIX H

NOTICE OF APPEAL TO
THE SUPREME COURT OF
THE UNITED STATES,
FILED AND ENTERED IN
THE COUNTY CLERK'S
OFFICE OF NASSAU COUNTY,
NEW YORK, ON JULY 19, 1977.

the final order of the Court of Appeals of the State of New York dated and entered June 7, 1977 holding that the statutory rate of interest constitutes a judicially acceptable return for the use of property acquired in the condemnation proceeding and that it is not measured by the appropriate rate of interest for delay in payment established by undisputed evidence at the trial, and from the whole of said order as well as each and every part thereof.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

Dated, July 11, 1977

SAMUEL GOLDSTEIN
SAMUEL GOLDSTEIN & SONS
Attorney for Appellant
Eveandra Enterprises, Inc.
217 Broadway
New York, N.Y. 10007
(212) RE2-5433

APPENDIX H

NOTICE OF APPEAL TO
THE SUPREME COURT OF
THE UNITED STATES,
FILED AND ENTERED IN
THE COUNTY CLERK'S
OFFICE OF NASSAU COUNTY,
NEW YORK, ON JULY 19, 1977.

TO: Hon. William Gitelman
County Attorney of Nassau County
State of New York
Attorney for the County of Nassau,
Appellee
Nassau County Executive Building
Mineola, New York 11501

Hon. Harold W. McConnell
County Clerk of the County of Nassau
State of New York
240 Old Country Road
Mineola, New York 11501

Hon. Joseph W. Bellacosa,
Clerk of the Court of Appeals
of the State of New York
Court of Appeals Hall
20 Eagle Street
Albany, New York 11518

Supreme Court of the United States:

The above named counsel for Appellant, SAMUEL GOLDSTEIN, a member of the bar of this Court, having duly entered his appearance herein, does hereby certify pursuant to Rule 33 (1) (3b) (4) that the above named persons which include those listed in Rule 10 (1) (2) (4) have been

APPENDIX H

NOTICE OF APPEAL TO
THE SUPREME COURT OF
THE UNITED STATES,
FILED AND ENTERED IN
THE COUNTY CLERK'S
OFFICE OF NASSAU COUNTY,
NEW YORK, ON JULY 19, 1977

served with a copy of this Notice of Appeal, by having enclosed the same in a postage prepaid envelope addressed to each of them at the addresses listed above and depositing same in a mailbox maintained by the United States Post Office.

s/_____
SAMUEL GOLDSTEIN

Supreme Court, U. S.
FILED
SEP 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-210

In the Matter of the Application of County of Nassau Acquiring Property for the Mill Neck Conservation of the Area of Open Space and Excess Lands, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York

THE COUNTY OF NASSAU,

Appellee,

—against—

EVEANDRA ENTERPRISES, INC.,

Appellant.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

WILLIAM GITELMAN
County Attorney of Nassau County
Attorney for Appellee
Nassau County Executive Building
1 West Street
Mineola, New York 11501
(516) 535-3307

NATALE C. TEDONE
Senior Deputy County Attorney

~~Peter B. Erdmen~~
~~*Law Intern on the Brief*~~

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

In the Matter of the Application of County of Nassau Acquiring Property for the Mill Neck Conservation of the Area of Open Space and Excess Lands, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York

THE COUNTY OF NASSAU,

Appellee,

—against—

EVEANDRA ENTERPRISES, INC.,

Appellant.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of New York on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

I

The State Statute Involved and the Nature of the Case

A. The Statute

This appeal raises the question of the validity of §3-a(2) of the General Municipal Law of New York, as amended by L 1 939 C 1102 (23 McKinney's Consolidated Laws of New York).

Section 3-a of the General Municipal Law deals with the rates of interest on judgments and accrued claims against municipal corporations. The section that is relevant in this case is subdivision "2" which states:

> "(2) The rate of interest to be paid upon any judgment or accrued claim against the municipal corporation arising out of condemnation proceedings or action to recover damages for wrongful death shall not exceed six per centum per annum."

As the statute clearly states, six percent annual interest is the maximum to be paid in compensation for a condemnation proceeding. There is no provision in the statute which provides for payment of interest in excess of that amount.

B. The Proceedings Below

On October 7, 1969 the subject property, vacant land, located in the northwest section of the meadowland of Mill Neck Creek partially in the Village of Bayville and partially in the unincorporated area of Locust Valley, in the Town of Oyster Bay, County of Nassau was acquired by a proceeding in eminent domain for conservation purposes.

The owner of record on the date the title to the property vested in the Appellee, was Claimant-Appellant Eveandra Enterprises, Inc. (hereinafter Appellant) who acquired title in October, 1968. By decision after trial, dated December 19, 1974, the Supreme Court, Nassau County, made an award for damages for the subject parcel in the amount of $261,300.00. A Partial Tentative Decree awarding such amount as Appellant's damage, with interest thereon at the rate of six per cent was entered on January 30, 1975.

Pursuant to Chapter 1161 of the Laws of 1971 (McKinney's 1971 Session Laws of New York, 194th Session at p. 2190), Appellee made an advance payment to Appellant in the amount of $107,725.75. The balance upon which interest was due was therefore $154,474.25. Interest at the statutory rate of 6% ran from October 7, 1969, the date title vested in Appellee, to January 30, 1975, the date upon which the Partial Tentative Decree was handed down. By check dated August 12, 1975, Appellee paid Appellant the balance plus interest due, in the amount of $208,797.96.

On March 3, 1975, Appellant filed Verified Objections to the Partial Tentative Decree alleging that the award constituted the taking of property without just compensation.

Special Term of the State Supreme Court, Nassau County, (Albert, J.), held a hearing on the issue of the amount of interest awarded. Appellant offered the testimony of two experts, which showed that the prime rate of interest between 1969-70 ranged from 8½% to 8%, that returns to the County on bank Certificates of Deposits was 7.29% per annum, that the "true" rate of interest on most loans from banks was 12%, and that the median average between the return to the County on its

Certificates of Deposit and the return to banks on their loans to borrowers was 9.75% per annum. There was no testimony that Appellant had any damage requiring any extra payment.

Justice Albert held that "the 6 per cent interest paid on the condemnation award herein is fair and within the judicial ascertainment of just compensation."

The Appellate Division of the Supreme Court, Second Department, unanimously affirmed Special Term.

Appellant appealed to the Court of Appeals on the question of the constitutionality of §3-a(2) of the General Municipal Law. Appellant contended that the decision of the Appellate Division was repugnant to the Fifth and Fourteenth Amendments to the Federal Constitution.

The Court of Appeals affirmed the Appellate Division and held that the appropriate interest rate is not measured by fluctuations of interest rates for public or private securities or lending, and that "so long as the statutory rate constitutes a judicially acceptable fair return for the deprivation of the use of that property or the money equivalent of that use . . . the statutory rate should be considered proper."

II

Argument

Since *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 43 S. Ct. 354, 67 L. Ed. 664 (1923) "just compensation" under the Fifth Amendment when used in connection with condemnation proceedings embraces not only the value of the property at the date of taking, but whenever the taking precedes payment the term also includes "such addition as will produce the full equivalent of that

value paid contemporaneously with the taking, . . ." (at 67 L. Ed. 670)

The specific question involved in this action is whether the statutory interest rate of 6 per cent per annum under §3-a(2) of the General Municipal Law of New York is a deprivation of such just compensation guaranteed by the Fifth Amendment.

The Fifth Circuit in *U. S.* v. *Baugh et al.*, 149 F. 2d 190 (1945), held that in condemnation proceedings where the taking precedes payment, the additional value which landowner is entitled to for purpose of producing full equivalent of value of property paid contemporaneously with taking, *"may be measured by the legal rate of interest, if reasonable, in the state where the property is located."* (at 193) (emphasis added) (C.F. *Phelps* v. *U.S.*, 274 U. S. 341, 47 S. Ct. 611, 71 L. Ed. 1083 [1927]).

To demonstrate that §3-a(2) is unconstitutional, Appellant must prove that the application of that provision is unreasonable and violative of substantive due process of law. It would be necessary for Appellant to prove that this provision bears no rational relation to the legitimate governmental interest of providing just compensation for the taking of land only (without further damages). He must also overcome the presumption of constitutionality and the proper legislative purpose of said statute.

Appellee contends that Appellant did not meet that burden in the New York Supreme Court, Nassau County, in the Appellate Division, in the Court of Appeals of New York, nor does he meet that burden here.

Appellant attempts to pose a substantial federal question for this Court to consider. He is unable to do so, for one does not exist.

Appellant contends that §3-a(2) as applied by the Court of Appeals of New York is in direct conflict with decisions of the Supreme Court of the United States which hold that interest on a condemnation award is part of just compensation whose determination is solely a judicial function and that the Legislature cannot say what compensation should be paid.

It is respectfully submitted that such is not the case. Clearly, by the very language of the Court of Appeals, the Court recognized that interest is part of the just compensation. Furthermore, the statutory interest is subject to judicial review to assure a fair return for the deprivation of the use of property.

A proper reading of the cases cited by Appellant on this point (*Seaboard Air Lines Ry. Co.* v. *U. S.*, 261 U. S. 299 [1923]; *Jacobs* v. *U. S.*, 290 U.S. 13 [1933]; *Phelps* v. *U. S.*, 274 U.S. 341 [1927]; *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312 [1893]; and *U. S.* v. *Commodities Corp.*, 339 U. S. 124 [1950]) will disclose the clear distinctions between those cases and the instant action. *Seaboard, Jacobs,* and *Phelps,* supra, all involved condemnation proceedings brought under statutes that did not provide for interest. Obviously, the ascertainment of the rate of interest to be applied in such a situation must be a judicial function. In the present case, due to the existence of a presumptively valid statutory interest rate, the judicial function is narrowed to that of review of reasonableless. *U. S.* v. *Baugh,* supra, at 193.

Neither *Monongahla,* supra, nor *Commodities,* supra, deal specifically with the issue of interest in a condemnation award proceeding.

U.S. v. *Blankinship,* 543 F. 2d 1272 (9th Cir. 1976) held that the determination of whether a proper and reasonable

rate in excess of 6 per cent is required and the amount of such rate is a factual question and should be determined by the trier of fact. (C. F. *U. S.* v. *100 Acres of Land,* 468 F. 2d 1261 [9th Cir. 1972]). This is not in conflict with the case at hand. There was ample evidence before the Court concerning alternative rates of interest and what damages were sustained by the Appellant, there was none in this case. Obviously, the lower Court remained unconvinced by this evidence that 6 per cent per annum was not a fair return for the use of Appellant's property.

The Court in *Blankinship* specifically went on to note that it did not condemn the use of a local legal rate of interest, "or other rates not explicitly keyed to rates applicable to marketable Treasury bills, notes, and bonds, as an alternative measure of just compensation for delay in payment." (at 1277)

There is no unfairness in this case. "The Condemnee's sole damage is delay in the payment of his award. His sole claim is to an additional element of compensation for the delay . . ." *Lincoln Square Slum Clearance Project,* 15 A.D. 2d 153, 179 (1st Dept. 1961), aff'd 16 N.Y. 2d 497 (1965). The Court of Appeals agreed that interest at the rate of 6% as provided by the statute in question was not so unreasonably low as to deprive the claimant of just compensation.

In *Lincoln Square Slum Clearance Project,* supra, claimant submitted evidence that a higher rate of interest would be factually the fair rate of interest for the use of money in the open money market in New York City. The evidence so offered was very similar to the evidence Appellant offered in the instant action. The Court, however, found that such evidence, even if proven, "would not overcome the presumptive applicability of §3-a" (at 181). The Court then recognized that the lower Court in *Lincoln*

"with complete fairness and wisdom . . . adopt[ed] an interest rate which common knowledge tells us reflects a reasonable balance between return and safety. The objective of Courts in eminent domain proceedings is to do substantial justice (*Homersley* v. *Mayor of City of N.Y.*, 56 N.Y. 533, 538; *U. S.* v. *Miller*, 317 U.S. 369, 375; *U. S.* v. *Cors*, 337 U. S. 325, 332); 'to see that it is just not merely to the individual whose property is taken, but to the public which is to pay for it.' (*Seal* v. *School Dist., Lake County*, 133 U. S. 553, 562; See also, *New York, Ontario and Western Ry. Co.* v. *Livingston*, 238 N.Y. 300, 306.) (at 181-2).

No doubt, Appellant can offer evidence of higher available interest rates in the open money market of New York. Nonetheless, the Court in *Blankinship*, supra noted that an interest rate applicable to a municipal, state or Federal government may well be lower than that applicable to other borrowers. (at 1276). Here, the obligation to pay was an obligation of the State of New York, a "creditor whose obligation embodies no risk of default." (Id.)

Appellant in challenging §3-a(2) offers another test in determining appropriate interest rates—that of a median average of the interest that the County of Nassau obtains on its investments plus the rate of interest payable to banks and other professional lenders on the loans they make. Such a yardstick is too speculative and is not the proper means of establishing the correct interest rate.

Appellant's second basis for attacking the decision of the Court of Appeals in the instant case rests upon the erroneous contention that the Court established a new doctrine or test regarding interest in eminent domain appropriation cases that is at variance with the decisions of the Supreme Court.

The New York Court of Appeals held that

"Compensation accruing at the time of vesting and for the period prior to an award in a condemnation proceeding 'is payable as a substitute for the beneficial use of the real property' (*Matter of Rochester Carting Co.* v. *Levitt*, 26 N.Y. 2d 264, 268)."

Appellant contends that the Court of Appeals was utilizing a "beneficial use" or net rental value test rather than a test based on the loss of the use of the money awarded for the property.

The Court of Appeals was not establishing a new test based on "beneficial use". Rather, the language used in *Rochester Carting* was *dicta*. As Appellant so appropriately noted in his Reply Brief to the Court of Appeals: "All the Court was doing was *describing* the historic function of interest, not the means of determining its fairness as just compensation." (emphasis added). (Appellants' Reply Brief, p. 8) The Court's "Beneficial use" discussion merely distinguished the basis for pre- and post-judgment interest.

III

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this case depends is so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of New York.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-210

In the Matter of the Application of
County of Nassau Acquiring Property
for the Mill Neck Conservation of
the Area of Open Space and Excess
Lands, Incorporated Village of
Bayville, Town of Oyster Bay,
Nassau County, New York

THE COUNTY OF NASSAU,

Appellee,

-against-

EVEANDRA ENTERPRISES, INC.,

Appellant.

On Appeal from the Court of Appeals
of the State of New York

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

(Cover Page 1)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-210

In the Matter of the Application of County of Nassau Acquiring Property for the Mill Neck Conservation of the Area of Open Space and Excess Lands, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York

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THE COUNTY OF NASSAU,

Appellee,

-against-

EVEANDRA ENTERPRISES, INC.,

Appellant.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

ARGUMENT

Appellee's motion to dismiss or affirm fails to state any grounds or give any reasons why this Court should not set this case for argument. It advances an untenable argument not supported by any authority, and misstates the holdings of the courts in the cases cited.

I

Appellee raises a most ingenious argument at page 5. It argues that §3-a (2) of the General Municipal Law in which the State Legislature fixed the maximum rate of interest to be paid on a condemnation award, must be presumed valid and constitutional; that in the judicial process appellant had the burden of proving that the rate of interest fixed by the legislature is unreasonable and violative of substantive due process of law, and that appellant did not meet that burden nor overcome the presumption of constitutionality and the proper legislative purpose of that statute.

By appellee's theory there is then cast on appellant a greater burden than the ordinary preponderance of the evidence, such as the additional burden of proving the unreasonableness of the statutory rate of interest, the burden of overcoming the presumption of constitutionality and to submit proof that the statute did not involve a proper legislative purpose. It adopts a position that the legislature has the right to

intrude upon the judicial function of the determination of just compensation by imposing upon a condemnee a larger burden of proof in the determination of just compensation. It presupposes that the legislative rate is fair and reasonable. If appellee's argument is valid then the legislature, we assume, would be empowered to provide for other presumptions of just compensation, such as the assessed valuation of property fixed by a municipality, value as depreciated in a federal tax return, the condemnor's appraised value and a myriad of other possibilities. This is the thrust of this entire case. The Courts below have in effect done what appellee now argues they may do of right. If the decision below stands it will open a pandora's box of these other possibilities and profoundly change existing law.

Interest on a condemnation award is not granted by legislative grace as in various other types of litigation and judgments, where no common-law or constitutional right to interest exist. *45 Am. Jur. 2d, Interest and Usury* §59; *Purcell v. L.I. Daily Press Pub. Co.* 9 N.Y.2d 255 (1961), contra. *Rochester Carting Co. v. Levitt* 36 N.Y.2d, 264 (1915). It is constitutionally mandated as a part of just compensation. The rate of interest is a question of fact judicially determined by the weight of the evidence. *U.S. v. Blankinship*, 543 F2d 1272 (9th Cir 1976). In the instant case appellee submitted no contrary evidence to that of appellant at the trial. In fact it virtually conceded that the opinion and statements of appellant's witness as to the proper rate of

interest, was fair (A-129, 130).[1]

As stated in appellant's Jurisdictional Statement (p. 13), it is only where there is an absence of proof of a proper rate of interest, that courts have accepted as presumptively fair the rate of interest fixed by statute. *Bronx River Parkway* 259 A.D. 522, (1940) aff'd 284 N.Y. 48 (1940).

II

The decision by the Fifth Circuit in *U.S. v. Baugh et al*, 149 F2d 190 (1945) cited by appellee at page 5, follows the settled law that interest is a part of just compensation and that its determination is solely a judicial function. The issue in that case was whether any interest at all was allowable on the sum agreed to be paid for the taking in a condemnation proceeding. Appellee at page 6 eroneously cites this case for the proposition that where, as in the in the instant case, there is a "presumptively valid statutory interest rate, the judicial function is narrowed to that of a review of its reasonableless".

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[1] A-129, 130 refers to pages in appellant's appendix in the New York Court of Appeals, transmitted to this Court as part of the original record.

III

While *Monogahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893) and *U.S. v. Commodities Corp.*, 339 U.S. 124 (1950), do not, as stated by appellee at page 6, "deal specifically with the issue of interest in a condemnation award proceeding" they do hold, as stated in *Monogahela* (p.327), that "It does not rest with the legislature .... to say what compensation shall be paid, or even what should be the rule of compensation".

IV

Appellee at page 7 incorrectly states that in *Lincoln Square Slum Clearance Project* 15 A.D.2d 153 "claimant submitted evidence that a higher rate of interest would be factually the fair rate of interest .....". There was no evidence of a proper rate of interest adduced at the trial. As stated by the Court in that case (p.181) an "affidavit of counsel (was submitted) stating that 6% per annum is factually the fair rate of interest for use of money in the money market in New York City .....".

V

It is inaccurate for appellee to state (p.3) that appellant offered testimony showing that prime rates of interest between 1969-1970 ranged from 8-1/2% to 8%. The testimony was that during the 5-1/2 year period of delay in payment, prime rates to most favored borrowers were

in the range of 4-3/4% to 12% (A-137); that the rate of interest on most loans from banks was not 12%, but that the "true" rate was 16.15% (A-71,72,74), and that 12% was the average rate over the 66 month period. (A-120). It was, for the reasons as held in *Blankinship*, supra, referred to by appellee (p.8), that interest rates applicable to a Municipal, State or Federal government may well be lower, that a medium between the average borrowing cost of 12% and the County's return on short time investments of 7.5% or 9.74% was testified to as being the fair rate of interest applicable to the County of Nassau (A-127-129). This rate of 9.75% reflected a reasonable balance between return and safety - a "median" which was held to be the proper rate in *Lincoln Square Slum Clearance*, 15 A.D.2d 153, 178-180 (1961), aff'd 16 N.Y.2d 497 (1965), and in *Manhattan Civic Center Area*, 57 Misc.2d 156 (1968), aff'd 32 A.D.2d 530 (1969), aff'd 27 N.Y.2d 518 (1970).

Respectfully submitted,

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